bound by his actions in this regard as against an innocent purchaser. In the latter case, however (*i. e.* where the trustee sells without authority), the purchaser, innocent though he be, is put on notice that before the trustee has any right to sell someone else is to be consulted, that the trustee cannot sell of his own volition, and that there are certain conditions precedent which must be complied with. There are numerous cases which hold that defective execution of the power of sale is of no effect as against a remote *bona fide* purchaser,[38] and, while in none of the cases which have fallen under our observation has this distinction been discussed, still the net result of the decisions establishes it.

THE LIABILITY OF TELEGRAPH COMPANIES FOR NEGLIGENCE IN THE TRANSMISSION AND DELIVERY OF MESSAGES.

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[*Continued from September Number.*]

III. NEGLIGENT BREACH OF DUTY AND CONTRIBUTORY NEGLIGENCE.

(1). *The Duties of Telegraph Companies and their Breach.*

The duties of telegraph companies in regard to messages are to receive, to transmit, and to deliver them. If they refuse to receive for forwarding any proper message properly presented, as we have already seen, an action will lie to the injured party for damages. So also, an action will lie for failure to exercise due care and diligence in the transmission and delivery of messages. We have al-

[38]Long v. Rogers, Fed. Cas. No. 8482 (sale made at wrong place—nevertheless a remote *bona fide* purchaser took good title); Burns v. Thayer, 115 Mass. 89 (sale attacked because trustee had purchased at his own sale—held that a purchaser from him took good title); Gunnell v. Cockerille, 84 Ill 319 (defect in advertisement); Dryden v. Stephens, 19 W. Va. 1 (refusing to set aside a sale on the ground that the price at the trustee's sale was grossly inadequate, where an innocent purchaser has since bought the property). In this last case there is also a *quære* as to the effect on a remote purchaser of a defect in the advertisement, and the *dictum* of Judge Tucker in Gibson v. Jones (supra) is criticised and disapproved.

Wilson v. South Park Commissioners, 70 Ill. 46; Jones on Mortgages (5th ed.), sec. 1913.

On this general subject, see excellent note of Mr. Freeman appended to Tyler v. Herring (Miss.) 19 Am. St. Rep. 263, 266; also, article in 2 Am. Law Reg. (N. S.) 641, 715.

ready noted the nature and degree of care required, and that this care varies with the importance and urgency of the message.

RECEIVING.

A regulation requiring messages to be written is reasonable,[1] and a telegraph company may refuse to receive a message orally; but, if it does receive a message orally, and agrees to forward it, it is still bound to exercise the usual degree of care in its transmission and delivery.[2] The same rule applies, where the company, in spite of a regulation that messages must be written on its printed blanks, accepts for transmission a message written on a blank piece of paper,[3] and also where a regulation requiring prepayment is disregarded by the operator.[4] So a telegraph company may refuse to receive messages in furtherance of gambling transactions, such as dealing in futures, but, having once undertaken to forward, it must use due care.[5]

Messages, save those that are necessary, that is, such as are sent to relieve the sick or prevent irreparable injury to life or property, need not be forwarded on Sunday.[6] Indeed, as in many states a contract made on Sunday is illegal, the sending of a message not necessary on Sunday is contrary to the law; and it has been held that telegraph companies are not liable at all for negligence in forwarding or delivering such messages, and that the burden is on the plaintiff to prove that the message was neessary.[7] This view seems to overlook the fact that the gist of the telegraph company's breach of duty is negligence, a tort. Certainly the better doctrine is that set forth in *Gulf etc. R. Co.* v. *Levy*,[8] that the company should not escape liability for its tort under the plea that what made its breach of duty possible was the illegal contract to which it was a party. The analogy here to common carrier law is clear. It is well settled that a carrier, transporting goods on Sunday contrary to law, is still liable if the goods are lost or damaged through its negligence.

[1]Supra, II., (1).

[2]Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 9 Sou. 414.

[3]Western U. Teleg. Co. v. Jones, 69 Miss. 658, 13 Sou. 471.

[4]Western U. Teleg. Co. v. Cunningham, 99 Ala. 314, 14 Sou. 579.

[5]Smith v. Teleg. Co., 84 Ky. 664, 4 Am. St. Rep. 126.

[6]Brown v. Teleg. Co., (Utah) 21 Pac. 988; Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23.

[7]Western U. Teleg. Co. v. Yopst, 118 Ind. 248, 3 L. R. A. 224; Rogers v. Teleg. Co., 78 Ind. 169, 41 Am. Rep. 558.

[8]59 Tex. 548, 46 Am. Rep. 278.

If a telegraph company receives and undertakes to transmit a message gratuitously, making no agreement for exemption from liability, the party injured may recover damages from the company for its negligence, in spite of the want of consideration.[9]

TRANSMISSION.

Messages must be transmitted promptly and accurately. Failure to forward,[10] or any unreasonable delay[11] in forwarding, or in transmission, will render the company liable. If any obstruction to transmission arises, so that the message cannot be promptly forwarded, it is the duty of the telegraph company to use proper diligence to inform the sender of the obstruction; and a failure to perform this duty will render the company liable for any damages occasioned by the delay, even though the obstruction resulted from unavoidable causes.[12]

Since messages are necessarily abbreviated, absolute accuracy is essential. Owing to the high development of the art of telegraphy, errors in transmission are comparatively few, and there is little excuse for them. The consequences of a slight error may be various, and the damage resulting, extended. This phase of the subject may be dismissed with a few illustrative cases. In *De Rutte* v. *Teleg. Co.*,[13] the price at which an agent was directed to purchase wheat, was changed to a higher price, and the company was held liable for the loss. In *Western U. Teleg. Co.* v. *Crawford*,[14] a changed date caused a premature sale, and the plaintiff reovered the difference between the market price of the goods at the two dates. In *Tobin* v. *Teleg. Co.*,[15] "S. I." was changed to "S. C.," and the plaintiff was allowed compensation for an unnecessary trip to South Carolina, when he should have gone to Staten Island.

DELIVERY.

The great majority of the actions against telegraph companies are for failure to deliver or negligent delay in delivery. Prompt

[9]Western U. Teleg. Co. v. Snodgrass, 94 Tex. 284, 86 Am. St. Rep. 851.

[10]Birney v. Teleg. Co., 18 Md. 341, 81 Am. Dec. 607; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 Sou. 844.

[11]Thompson v. Teleg. Co., 64 Wis. 531, 54 Am. Rep. 644; Pearsall v. Teleg. Co., 124 N. Y. 256, 21 Am. St. Rep. 662; Birkett v. Teleg. Co., 103 Mich. 361, 50 Am. St. Rep. 375; Barnes v. Teleg. Co., 27 Nev. 125, 77 Am. St. Rep. 791; Pacific Postal Teleg. Co. v. Fleischner, 66 Fed. 899.

[12]Pacific Cable Co. v. Fleischner, 55 Fed. 738; Bierhaus v. Teleg. Co., 9 Ind. App. 246, 34 N. E. 581.

[13]1 Daly 547, Allen's Cases 273.

[14]110 Ala. 460, 20 Sou. 111.

[15]146 Pa. St. 375, 28 Am. St. Rep. 802.

delivery of messages is one of the duties imposed by law upon telegraph companies. Without it telegraphy would be of no practical use. We have noted that the degree of promptness necessary varies with the nature and importance of the message. For example, a message summoning a physician requires very high speed in delivery.[16]

A message must be delivered in writing, not orally, nor by telephone.[17] It must be delivered to the addressee at the place to which it is directed. If he is not there, reasonable effort must be made to find him.[18] And, if he cannot be found, the message may be delivered, either to those in charge at his place of business, or to members of his family at his residence.[19] Where a telegram is sent in care of a person other than the addressee, the company performs its duty by delivering the message to that person.[20] In *Lefler* v. *Teleg. Co.*,[21] where a message was sent in care of the Southern Railway, delivery to the ticket agent at the station, after reasonable effort to find the addressee, was held sufficient. In *Western U. Teleg. Co.* v. *Houghton*,[22] it was held that, where a message was sent in care of a "Mr. B.," and there was no such person in the town, the telegraph company's duty was not performed until it had made some effort to find the addressee. Where the message is directed to the addressee at a hotel, and the addressee is not at the hotel at the time the message arrives, it is sufficient to deliver the message to the clerk.[23] In a Texas case,[24] however, it was held that delivery to the clerk is not sufficient, in the absence of authority given the clerk by the addressee to receive his messages, or a custom for clerks to receive telegrams for guests. It seems that such a custom generally prevails.

It is the duty of the telegraph company, where the addressee cannot be found, or, for some other reason, delivery is impossible,

[16]Western U. Teleg. Co. v. Pelzer, (Tex.) 35 S. W. 836.

[17]Western U. Teleg. Co. v. Pierce, (Tex.) 70 S. W. 360; Sherm. & Redf. on Neg. Sec. 5400.

[18]Western U. Teleg. Co. v. Cobb, 95 Tex. 333, 93 Am. St. Rep. 862; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 9 S. W. 598.

[19]Given v. Teleg. Co., 24 Fed. 119; Western U. Teleg. Co. v. Woods, 56 Kans. 737, 44 Pac. 989; Western U. Teleg. Co. v. Mitchell, 91 Tex. 454, 66 Am. St. Rep. 906.

[20]Western U. Teleg. Co. v. Young, 77 Tex. 245, 19 Am. St. Rep. 751.

[21](N. C.) 42 S. E. 819.

[22]82 Tex. 561, 27 Am. St. Rep. 925.

[23]Western U. Teleg. Co. v. Houghton, 82 Tex. 561, 27 Am. St. Rep. 925; Western U. Teleg. Co. v. Trissol, 98 Ind. 556.

[24]Western U. Teleg. Co. v. Cobb, 95 Tex. 333, 93 Am. St. Rep. 862.

to notify the sender of the fact. Such notification may enable the sender to give a better address or to lessen the damages.[25]

(2) *Contributory Negligence.*

Since the basis of the plaintiff's action against the telegraph company for failure to exercise proper care in the transmission or delivery of a message, is the negligence of the defendant, the plaintiff's right to recovery is defeated, if his own negligence contributed directly to the injury which he has suffered. Thus, where the sender, intending to write "two," negligently wrote what more nearly resembled "ten," and the insertion of "ten" in the delivered message caused a loss to the sender, recovery was denied him because of his own negligent writing.[26] So an erroneous address given by the sender will prevent recovery for a failure to deliver;[27] and this is true, even though the action is brought by the addressee, provided the company has made reasonable effort to find the correct address.[28] In the latter case, however, the right to recover is not defeated by contributory negligence, but never exists, because there is no negligence on the part of the company. In *Given* v. *Teleg. Co.*,[29] it was held that the plaintiff could not maintain his action for the failure of the company to deliver a message to him, because his failure to tell his wife his whereabouts, the messenger having inquired of her, amounted to contributory negligence. Where the plaintiff seeks to recover from the telegraph company for his mental anguish from not getting to the bedside of a near relative before his death, because of the company's negligent delay in the delivery of a message summoning him, his own failure to start promptly after receiving the message will bar his recovery.[30] An operator requested by the sender to write out a message for him is acting as the sender's agent, and a mistake in the message as written by him will amount to contributory negligence on the part of the sender.[31]

[25]Sherril v. Teleg. Co., 116 N. C. 655, 21 N. E. 429; Hendricks v. Teleg. Co., 126 N. C. 304, 78 Am. St. Rep. 659; Laudie v. Teleg. Co., 126 N. C. 431, 78 Am. St. Rep. 668; Western U. Teleg. Co. v. Sorsby, Tex.) 69 S. W. 122.

[26]Koons v. Teleg. Co., 102 Pa. St. 164.

[27]Western U. Teleg. Co. v. Patrick, 92 Ga. 607, 18 S. E. 980.

[28]Hargrave v. Teleg. Co., (Tex.) 60 S. W. 687; Western U. Teleg. Co. v. McDaniel, 103 Ind. 294, 2 N. E. 709.

[29]24 Fed. 119.

[30]Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725; Western U Teleg. Co. v. Matthews, (Ky.) 67 S. W. 849.

[31]Western U. Teleg. Co. v. Foster, 64 Tex. 220, 53 Am. Rep. 754.

Where, though there has been error in the transmission, the message is still intelligible, and there is nothing to arouse the suspicion of the receiver, his acting upon it will not amount to contributory negligencce.[32] But, if the message as transmitted is unintelligible, and the receiver guesses at its meaning, he acts at his peril, and the company is not liable for the damage which may result from his so acting.[33] Here it is the receiver's duty to have the message repeated.

IV. The Action for the Negligent Breach of Duty.

(1) *The Plaintiff in Action.*

Negligence *per se* is not actionable; it is so only where there exists a duty. This duty arises out of a relation, which may be the relation growing out of a contract, or such a relation as the law of torts recognizes as creating a duty. So, before an action can be brought, we must find the existence of a relation involving a duty.

THE SENDER AS PLAINTIFF.

Where the sender of a message brings an action against the telegraph company for negligence in its transmission or delivery, the relation is plain. It is, at the same time, created by contract and recognized by the law of torts. So there is a double duty owed by the company to the sender: the duty to perform the contract, and the duty not to be negligent in its performance. Hence the sender, where the company has been negligent in the transmission or delivery of the message, like an ordinary bailor or a shipper of goods, may bring his action either *ex contractu* or *ex delicto*.[1]

It may be added that, especially in modern times, the form of the action is immaterial. The liability of the company is the same in either case; the sender will be bound by the valid conditions of the contract as well when he sues in tort as when his action is on the contract;[2] and, as we shall see, the measure of damages is the same in either case.[3] It is worthy of notice, also, that the real sender is not necessarily the person whose name is signed to

[32]Tobin v. Teleg. Co., 146 Pa. St. 375, 28 Am. St. Rep. 802; Efird v. Teleg. Co., (N. C.) 43 S. E. 825; Koons v. Teleg. Co. 102 Pa. St. 164.

[33]Western U. Teleg. Co. v. Neil, 57 Tex. 282, 44 Am. Rep. 589; Hart v. Cable Co., 86 N. Y. 33.

[1]Carlan v. Teleg. Co., 118 Mich. 369, 43 L. R. A. 280.

[2]Coit v. Teleg. Co., 130 Cal. 657, 80 Am. St. Rep. 153.

[3]See Measure of Damages, V., (1) infra.

the message, but the principal in the transaction. The party signing may be an agent.[4]

THE ADDRESSEE AS PLAINTIFF.

The right of the addressee to maintain an action presents some difficulty. The English doctrine is that he cannot sue, unless the sender is his agent.[5] The argument is that the duty of the telegraph company arises solely out of contract, and that, since the addressee is not a party to the contract, he cannot sue for its breach. The English courts further hold that the action cannot be maintained on the ground of fraudulent misrepresentation, where there is error in the transmitted message, since, according to the doctrine of *Derry* v. *Peek,* there must be actual knowledge of the falsity of the statement, or, more accurately, an absence of a belief in its truth. In this country the right of the addressee to sue is well settled. It is placed upon various grounds, which require separate consideration.

First, if the sender is the agent of the addressee, the addressee may sue, either in contract or in tort, and whether the negligence of the company resulted in erroneous transmission, or in failure or delay in delivery. He is the real party to the contract. According to the rules of agency, it makes no difference whether the company knew of the agency or not.[6]

Secondly, if the contract of transmission was made expressly for the benefit of the addressee, he may maintain an action for the damages caused him by its breach.[7] This is but a narrow ground for the right, for, in many of the states, the right of the person, for whose benefit a contract is made, to sue upon it is not recognized,[8] and, in those states in which the right is recognized, it is restricted to cases where the contract is made especially, and, in some states solely, for his benefit. In accordance with these prin-

[4]Butler v. Teleg. Co., 62 S. C. 222, 89 Am. St. Rep. 893.

[5]Playford v. Teleg. Co., 4 Q. B. 706, Allen's Cases 437; Dickson v. Reuter's Teleg. Co., L. R., 2 C. P. Div. 62, 19 Moak's Rep. 313.

[6]Milliken v. Teleg. Co., 110 N. Y. 403, 1 L. R. A. 281; Coit v. Teleg. Co., 130 Cal. 657, 80 Am. St. Rep. 153; Western U. Teleg. Co. v. Wilson, 93 Ala. 32, 30 Am. St. Rep. 23; Herron v. Teleg. Co., 90 Iowa 129, 57 N. W. 696; Sherill v. Teleg. Co., 109 N. C. 527, 14 S. E. 94; Western U. Teleg. Co. v. Williford (Tex.), 27 S. W. 700.

[7]Chapman v. Teleg. Co.. 90 Ky. 265, 13 S. W. 880; Manier v. Teleg. Co., 94 Tenn. 442, 29 S. W. 732; West v. Teleg. Co., 39 Kans. 93, 7 Am. St. Rep. 530; International Ocean Teleg. Co. v. Saunders, 32 Fla. 437, 14 Sou. 148, 21 L. R. A. 810.

[8]See Postal Teleg. Co. v. Ford, 117 Ala. 672, 23 Sou. 648.

ciples, it is held that company must know, either from the face of the message or otherwise, that the contract is made for the benefit of the addressee.[9] Under this head the plaintiff may recover for negligence either in delivery or in transmission.

The *third* ground, upon which the right of the addressee to sue is based, is that of misrepresentation, suggested and repudiated in English case of *Dickson* v. *Reuter's Teleg. Co.*[10] This doctrine can apply, if at all, only where there is error in the transmitted message, and the receiver is caused thereby to act to his damage. Recovery on this ground was allowed in a Massachusetts case, *May* v. *Teleg. Co.*,[11] but, since the Massachusetts Court has later affirmed the doctrine of *Derry* v. *Peek*,[12] it is highly probable that it would now also follow *Dickson* v. *Reuter's Teleg. Co.*, in this particular.

The English case is severely criticized by Bishop, and with no little force of reason.[13] He contends that, since the company can know only through its agents, it knows through the forwarding agent what the true message is, and, when it delivers a false message through the receiving agent, it is making a false statement knowingly, and so should be held liable to the receiver in an action for deceit. Gray, in his work on Communication by Telegraph,[14] admitting that the English doctrine is sound upon principle and authority, contends that, on the ground of public policy and in order that telegraph companies may not escape liability for failure to perform their public duties, exception should be made in their case to the general rule that no action lies for careless misrepresentation.

It seems that the attempt to hold telegraph companies liable on the ground of deceit is strained. Granting the fact that there is present the knowledge of the erroneous form of the message, there is entirely absent the intent that the words shall be acted upon, which is one of the essentials for an action for deceit. In other words, the mental element is lacking. The whole duty of the company is to transmit and deliver promptly the words of the message just as delivered. It is similar to the duty of a carrier

[9]Western U. Teleg. Co. v. Wood, 57 Fed. 471; Elliot v. Teleg. Co., 75 Tex. 18, 12 S. W. 954; Butner v. Teleg. Co., 2 Ok. 234, 37 Pac. 1087.

[10]19 Moak's Rep. 313. See also supra.

[11]12 Mass. 91.

[12]Nash v. Minn. etc. Trust Co., 163 Mass. 574.

[13]Non-Contract Law, Sec. 1211.

[14]Sec. 73.

to transport goods intact. Except to discover the importance of the message and the consequent degree of diligence required in regard to it, the company need not, and does not, concern itself with the meaning of the words or the effect which they will have upon the receiver.

A liability for the negligent us of words has been suggested as a basis for the receiver's right of action against the company in these cases.[15] Whatever may be the justice in the contention for such a liability, it is not recognized in the law.

The *fourth* ground, and the true ground, for the maintenance of an action by the addressee is that the negligence of the company is the breach of a duty which it owes the addressee. Upon this broad ground rest the decisions in the great majority of the cases in this country, though there are few reasons given for the liability beyond the general one, that telegraph companies are servants of the public, and are liable for the damages that may result to any one of the public from their negligence. It is to be noted that, according to this view, the addressee may maintain his action, whether for damages resulting from his acting upon a message erroneously transmitted,[16] or for those suffered by him because of failure or delay in forwarding or delivering.[17]

This fourth ground demands closed examination. The action is for a breach of duty, but whence arises the duty? Is there such a relation between the telegraph company and the addressee as involves a legal duty? The origin of the relation must be considered. The true source of the relation is necessarily the contract made by the sender of the message. Then the duty, if there is any, arises out of the contract, and the neglect of the duty is a tort founded on contract. Here we are confronted with the rule, running through

[15]See 14 Harvard Law Review, p. 193.

[16]Western U. Teleg. Co. v. Dubois, 128 Ill. 248, 15 Am. St. Rep. 109; Webb v. Teleg. Co., 169 Ill. 610, 61 Am. St. Rep. 207; New York etc. Teleg. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 339; Tobin v. Teleg. Co., 146 Pa. St. 375, 28 Am. St. Rep. 802; Ellis v. Teleg. Co., 13 Allen 226; Elwood v. Teleg. Co., 45 N. Y. 549, 6 Am. Rep. 140; Western U. Teleg. Co. v. Waxelbaum, (Ga.) 39 S. E. 443; Western U. Teleg. Co. v. McCormick, 79 Fed. 449; Fererro v. Teleg. Co., 9 App. D. C. 445, 35 L. R. A. 548.

[17]Stamey v. Teleg. Co., 92 Ga. 613, 44 Am. St. Rep. 95; McPeek v. Teleg. Co., 107 Iowa 356, 70 Am. St. Rep. 205, 43 L. R. A. 214; Hadley v. Teleg. Co., 115 Ind. 191, 15 N. E. 845; Western U. Teleg. Co. v. Moore, 12 Ind. App. 136, 54 Am. St. Rep. 515; So Relle v. Teleg. Co., 55 Tex. Ct. App. 308, 40 Am. Rep. 805; Wadsworth v. Teleg. Co., 86 Tenn. 695, 8 S. W. 574; Western U. Teleg. Co. v. McNair, 120 Ala. 99, 23 Sou. 801; Beasley v. Teleg. Co., 39 Fed. 181. But see Deslottes v. Teleg. Co., 40 La. Ann. 183, 3 Sou. 566.

all the cases and books, that, whenever a tort is founded on contract,

"no one can sue in respect of the tort who was not a party, or privy to, and could not have sued upon the contract."[18]

The conclusion would seem to follow that, save where the addressee can sue on the contract as made for his benefit or by his agent, he cannot sue at all. But again we must insist upon the peculiar business of the telegraph company. Its duty and its undertaking are to transmit *and deliver to the addressee the exact message.* The addressee is brought very nearly into the transaction; he is, indeed, in a kind of privity to the contract. The delivery of the message to him is a part of the very contract and essential to its performance. In many cases the only substantial damages that can result from the company's breach of duty are those that the addressee may suffer. The company has not done its full duty when it has saved the sender harmless. The relation between the company and the addressee of a message certainly is close enough to create a duty which should be recognized by the law of torts. Justice demands that this duty should not be violated with impunity because of the fact that the relation arose originally out of a contract to which the addressee was not technically a privy. It certainly is contrary to public policy to allow a public servant to escape liability for substantial damages, resulting from its negligent performance of a duty imposed upon it by law. to one so closely interested in the proper performance of that duty as is the addressee of a telegraph message.

Out of regard for the value of human life, exception has been made to the privity-of-contract rule of *Winterbottom* v. *Wright,* where poison negligently sold gets into the hands of a third party and causes death or bodily harm.[19]

There is no reason why exception should not be made in our case. The very grounds for the decision in *Winterbottom* v. *Wright* are wanting here. The first ground is, that, if the rule were otherwise, there would be no limit to the number of actions. Here we contend for the right of only one person, besides the sender, to sue. The other ground is, that the injury to third parties is not the natural and proximate result of the breach of duty.

[18]Addison on Torts, Sec. 27; Winterbottom v. Wright, 10 M. & W. 109.
[19]Thomas v. Winchester, 6 N. Y. 397.

The damage to the addressee from error in transmission or delay in delivery of a message is often, not only the natural and proximate, but the inevitable result of the company's negligence. Moreover the company is protected from excessive claims on the part of the addressee by the laws of the measure of damages.

Since the addressee, in these cases, does not sue directly upon the contract but for the negligence, he must allege and prove some actual damages, and must bring a tort action.[20]

In many of the states, as Mississippi, Minnesota, Missouri, Tennessee, and Virginia, there are statutes, either expressly, or by implication through the use of such words as "party aggrieved," giving the addressee the right to maintain an action for damages or a penalty or both.[21]

A THIRD PARTY AS PLAINTIFF.

An entire stranger to the contract cannot, in general, maintain an action for negligence in regard to a message, because the damages that he suffers are too remote to have been in the contemplation of the parties, at the time of the making of the contract.[22] However, a person who is actually neither the sender nor the addrssee may sometimes sue, as, where the sender is his agent,[23] or where the message shows on its face that the contract is made expressly for the benefit of the third party,[24] or where the third party is the real person to whom the message is sent, the addressee being used merely as a means of getting the message to him.[25]

(2) *The Burden of Proof.*

Just as, in case of bailment of goods, breakage or loss raises a *prima facie* presumption of negligence on the part of the bailee,[26] so an error in a transmitted message or an unreasonable delay in delivery raises a *prima facie* presumption of negligence on the part of the telegraph company and throws upon it the burden of proving (in the sense of producing evidence) that the error or delay

[20]First Nat. Bank v. Teleg. Co., 30 Ohio St. 555.

[21]See Francis v. Teleg. Co., 58 Minn. 252, 44 Am. St. Rep. 507; Wadsworth v. Teleg. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; Connelley v. Teleg. Co., 100 Va. 51, 93 Am. St. Rep. 919; 2 Stimson's Am. St. Law, Sec. 8950-1.

[22]McCormick v. Teleg. Co., 79 Fed. 449.

[23]Harkness v. Teleg. Co., 73 Iowa 190, 5 Am. St. Rep., 672.

[24]Butler v. Teleg. Co., 62 S. C. 222, 89 Am. St. Rep. 893; Western U. Teleg. Co. v. McKibben, 114 Ind. 511, 14 N. E. 894.

[25]Western U. Teleg. Co. v. Mellon, 96 Tenn. 66, 33 S. W. 725.

[26]3 Am. & Eng. Encyc. of Law, (2d. ed.), p. 750; Wharton on Neg., Sec. 422.

is excusable.[27] The reasons for this doctrine are clearly stated by Boynton, J. *in Teleg. Co.* v. *Griswold.*[28] He says:

"If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require in many cases an impossibility, not infrequently resulting in enabling the company to evade a just liability."

Those courts which hold the repetition clause valid to exempt the company from all liability, save for gross error or wilful misconduct, hold, that a further effect of the clause is to throw upon the plaintiff the burden of proving the gross negligence or wilful misconduct. In other words, they hold that, unless the plaintiff can prove gross negligence or wilful misconduct, the company is, by the clause, freed from all liability.[29] In those states in which the repetition clause is held void, it can, of course, have no effect whatever, and so the burden is still on the company to excuse error or delay proved.[30] There are a few cases, which seem to hold that the effect of the repetition clause, though it will not excuse negligence, is to throw the burden of proving negligence upon the plaintiff.[31] A closer examination of them, however, shows that they are based upon the idea, now generally repudiated, that, in the absence of a contract exempting them, telegraph companies are liable for all errors and delays, and that the effect of the repetition clause is to free them from liability for errors or delays from uncontrollable causes.

In *Turner* v *Hawkeye Teleg. Co.*,[32] where the second company

[27]Rittenhouse v. Teleg. Co., 44 N. Y. 263, 4 Am. Rep. 673; Baldwin v. Teleg. Co., 45 N. Y. 744, 6 Am. St. Rep. 214; Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Fowler v. Teleg. Co., 80 Me. 381, 6 Am. St. Rep. 214; Harkness v. Teleg. Co., 73 Iowa 190, 5 Am. St. Rep. 672; Tyler v. Teleg. Co., 60 Ill. 421, 41 Am. Rep. 38; Reed v. Teleg. Co., 135 Mo. 661, 58 Am. St. Rep. 609; Hendricks v. Teleg. Co., 126 N. C. 307, 78 Am. St. Rep. 59; Western U. Teleg. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772; Western U. Teleg. Co. v. Cook, 61 Fed. 624.

[28]See (27) supra.

[29]United States Teleg. Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 510; Reddington v. Teleg. Co., 107 Cal. 317, 48 Am. St. Rep. 132; Grinnel v. Teleg. Co., 113 Mass. 299, 18 Am. Rep. 485; Passmore v. Teleg. Co., 78 Pa. St. 238.

[30]Teleg. Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500; Tyler v. Teleg. Co., 60 Ill. 421, 41 Am. Rep. 381; Reed v. Teleg. Co., 135 Mo. 661, 58 Am. St. Rep. 609; Bartlett v. Teleg. Co., 62 Mo. 209, 16 Am. Rep. 437; Wertz v. Teleg. Co., 7 Utah 446, 27 Pac. 172, 13 L. R. A. 510.

[31]Womack v. Teleg. Co., 58 Tex. 176, 44 Am. Rep. 614, Western U. Teleg. Co. v. Brown, (Tex.) 75 S. W. 359; Sweetland v. Teleg. Co., 27 Iowa 433, 1 Am. Rep. 285; Aiken v. Teleg. Co., 69 Iowa 51, 58 Am. Rep. 285.

[32]41 Iowa 458, 20 Am. Rep. 605.

was sued for error in a message transmitted over two connecting lines, it was held that the burden was on the defendant to prove that the error did not occur on its line. Similarly, in an action for a statutory penalty for the non-delivery of a message directed from the state in which the action was brought into another, it was held that the burden was on the telegraph company to prove that the non-delivery was due to some default arising outside of the state of the forum.[33]

[TO BE CONTINUED.]

[33]Western U. Teleg. Co. v. Howell, 95 Ga. 194, 51 Am. St. Rep. 68.